United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

ORIGINAL

75-2115

To be argued by
RAYMOND BERNHARD GRUNEWALD

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P/S

United States Court of Appeals
For the Second Circuit

Docket No. 75-2115

JOSEPH TREMARCO,

Petitioner-Appellant,

against

ATTORNEY GENERAL OF THE UNITED STATES, UNITED STATES ATTORNEY FOR THE EASTERN DISTRICT OF NEW YORK, DISTRICT ATTORNEY FOR KINGS COUNTY, STATE OF NEW YORK, POLICE DEPARTMENT OF THE CITY OF NEW YORK, STATE OF NEW YORK, FEDERAL BUREAU OF INVESTIGATION, and WARDEN, GREEN-HAVEN CORRECTIONAL FACILITY, STORMVILLE, NEW YORK,

Respondent-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLANT

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I N D E X

CASES CITED

STATUTES CITED

OTHER AUTHORITIES

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PRELIMINARY STATEMENT

On April 20, 1971, an indictment was returned in Kings County, New York, charging petitioner-appellant, Joseph Tremarco (hereinafter referred to as the "appellant"), with the crimes of attempted murder (Count 1); assault in the first

degree (Count 2); and possession of a dangerous weapon (Count 3). Appellant was tried in Brooklyn before the Honorable John A. Monteleone, Justice of the New York Supreme Court, and a jury. On September 28, 1971, a verdict of guilty was rendered as to all counts. On December 17, 1971, appellant was sentenced to twenty-five years imprisonment and a judgment of conviction was entered. On appeal, the conviction was affirmed by the Appellate Division, Second Department, State of New York, on May 30, 1972, without opinion. On June 29, 1972, the Court of Appeals, State of New York, denied leave, without opinion, for appellant to appeal to that Court. Petition, made to the United States Supreme Court for a Writ of Certiorari, was denied on December 4, 1972. On March 22, 1973, appellant sought a Writ of Habeas Corpus in the Eastern District of New York (73 C 317) and initial argument was heard before United States District Judge Costantino. By memorandum and order, dated May 24, 1973, Judge Costantino ordered the United States Attorney's office to turn over to appellant certain statements taken by federal agents of one Harry Bogin, the sole witness to and victim of the assault. Pending determination of appellant's motion for a new trial in the New York State Supreme Court, based on this newly discovered evidence, appellant's petition for habeas corpus was marked off the Eastern District calendar on September 19, 1974. On December 18, 1974, appellant's motion for a new trial in the State Court was denied and entered on the Court docket on January 6, 1975. A motion for a certificate granting permission to appeal to the Appellate Division, Second Department from the denial of the

motion for a new trial was denied on March 3, 1975. Having again exhausted his State remedies, appellant, by notice of motion dated March 12, 1975, restored the original habeas corpus motion to the calendar of the Eastern District of New York. United States District Judge Costantino, Eastern District of New York, on March 21, 1975, heard argument of the restored petition for writ of habeas corpus and reserved decision. Prior to Judge Costantino rendering a decision, all matters concerning the petition for the writ of habeas corpus were thereafter reassigned to United States District Judge Walter Bruchhausen. On June 18, 1975, Judge Bruchhausen, by memorandum and order, and without a hearing or oral argument, dismissed appellant's petition for a writ of habeas corpus. On July 16, 1975, appellant filed a timely notice of appeal to this Court from the denial of the writ.

STATEMENT OF FACTS

Preceding appellant's trial in the State Court, there was a hearing, which consumed more time than the actual trial, on the admissability of certain eye-witness identification and investigative records concerned therewith. (TR-A2-A345).[1]

The Hearing

On March 11, 1971, while in the Coney Island section of Brooklyn, New York, one Harry Bogin was shot down by an assailant wielding a machinegun. (TR-A37-TR-A40). On March 12, 1971, appellant, a resident of New Jersey, upon ascertaining that local police were looking for him, surrendered to the Newark, New Jersey police (TR-A136; TR-A263). On the day previous a warrant had issued from the United States Court, Eastern District of New York, charging appellant with obstruction of justice. (TR-A134; TR-A221-A222; TR-A294). In addition thereto, a bench warrant had been issued in Criminal Court, Part I, Kings County, New York, charging appellant with attempted murder. (TR-A268)

On March 12, 1971, at approximately 9 A.M., Raymond Brown, Esq., a New Jersey attorney, having been requested by another New Jersey attorney to represent appellant at his expected arraignment in the Newark Federal Court, appeared at the Newark

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1/ Reference key: "TR-A_____" refers to the verbatim State Court record contained in appellant's appendix for the state appeal, utilizing the appendix pagination as prefixed by the letter "A", since the actual trial transcript was confusingly misnumbered; "HR" for Eastern District hearing record page; "A" for appellant's appendix.

Police Headquarters and spoke with a Captain of the Newark Police who informed him that the appellant was imprisoned there. Mr. Brown was refused permission to see appellant and was informed that appellant was with "the federal people." (TR-A124-125). Mr. Brown was held in conversation with the Newark Police Captain. When Mr. Brown inquired why he could not see appellant immediately, he was informed that appellant had just left to go to the United States Commissioner's Office. (TR-A125). Mr. Brown then went across the street to the office of United States Magistrate Schweitzer, of the Federal Court at Newark. Magistrate Schweitzer expressed surprise and informed him he knew nothing about appellant, but checked and ascertained that appellant was being taken directly to Brooklyn, New York, although Magistrate Schweitzer was available for arraignment proceedings. (TR-A125-127). In the meantime, appellant was "released" on his own recognizance in Brooklyn, by the federal authorities, but was immediately taken into custody by New York City Police who were waiting in the Courtroom. The same New York City Police officers had previously procured the warrant charging appellant with the attempted murder of Harry Bogin. (TR-A159)

Mr. Brown then went to the then United States Commissioner's office in Brooklyn where he met Assistant United States Attorney Boyd. (TR-A129). Mr. Boyd told him that Tremarco was being turned over to the Brooklyn District Attorney and introduced him to Assistant District Attorney Davenport. (TR-A129-A130). Mr. Brown testified as to a conversation with Assistant District Attorney Davenport as follows:

"...'What are you going to do?'

"He said, 'We're going to book him and he will be arraigned tonight.'

"I said, 'Will there be any examination, any attempt to get any statements from him or any lineups?'

"He said, 'No, we won't do that.'

"I said, 'If so, Ill hang around until...[N.Y. counsel]...shows up, otherwise if it's just going to be a booking and an arraignment, there is no purpose in holding you up, and I have other matters to attend to.'

"And he said no there would not. I asked him again if there was going to be any lineup or statements and/or any examinations for identification. (TR-A132).

Mr. Brown then left appellant in the custody of Mr. Davenport and returned to New Jersey. (TR-A133).[2]

In spite of the representations made by Mr. Davenport, appellant was taken straight from the Federal Courthouse in Brooklyn to Coney Island Hospital, Brooklyn, New York. There he was displayed, in handcuffs, to Harry Bogin who identified appellant as his assailant. (TR-A276-A279).

Edward John Boyd, V, then an Assistant United States Attorney for the Eastern District of New York, testified that on March 12, 1971, appellant was taken from Newark, New Jersey, to Brooklyn, New York, to be arraigned as there was no magistrate available in Newark, New Jersey and, pursuant to Federal Rules,

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2/ Mr. Davenport did not attempt to cross-examine Mr. Brown at the trial. The same Mr. Davenport attested that although he was the assistant assigned on the day the incident occurred, he made no notes! (T-A54). Nor were any ever produced.

appellant was arraigned in the nearest jurisdiction. (TR-A230-A231). Mr. Boyd further testified although bail is usually requested on a charge of shooting a federal witness, it was not requested in this instance because the federal jails were crowded! It was known that the New York City Police were waiting to arrest appellant in the Magistrate's office when appellant was brought in for arraignment, although Mr. Boyd professed he did not know how the police knew of appellant's presence in the Federal Court. (TR-A232-A236).

Irwin Nacht, a New York City detective, testified that he had interviewed Bogin at Coney Island Hospital and that Bogin had told him that "John Tremarco" had shot him. Detective Nacht further testified that in the evening of March 11, 1971, at Newark, an F.B.I. agent had told him that appellant would be in Federal Court in Brooklyn on March 12, 1971; that he arrived in Brooklyn Federal Court at approximately 9:00 A.M. on March 12th hoping to pick up appellant; that he was aware that appellant was represented by Mr. Brown, an attorney; that after appellant's arraignment in Federal Court, he arrested him; that he had told Mr. Brown that appellant would be arraigned in the New York City Criminal Court as soon as possible; that he then, upon being told to do so by Mr. Davenport, accompanied appellant and Mr. Davenport to Coney Island Hospital arriving there at approximately 1:30 P.M.; that there was a show-up in Mr. Bogin's hospital room at approximately 4:00 P.M.; that photographs were shown to Mr. Bogin immediately prior to the show-up of appellant and that defense counsel was not present at the photo identification or the show-up and that the appellant was not advised that he had a right to have counsel

present at that time. (TR-A247; TR-A265; TR-A270; TR-A272-A280; TR-A284-A288).

Detective Nacht alluded to police reports called DD-5s, and while he was on the stand testified as to a Ballistics DD-5 concerning a "canvass":

> Q Do you have those reports in court with you?
>
> A. Yes, sir.
>
> Q May I have them, please?
>
> A -61 and the 5's are still intact. They haven't been broken down. That's the only one that is broken down, because that's from an out side command. That's from Ballistics.
>
> Q What are these other reports?
>
> A. Those are all DD-5's.
>
> MR. GILLEN: May I, your Honor?
>
> THE COURT: Sure.
>
> Q. These are all reports concerning this case?
>
> A This one is a canvass.
>
> MR. DAVENPORT: Your Honor, I am going to object to his getting to all the DD-5's. I think he should be limited to the conversation with Bogin. What we have here is an identification hearing. I think if there are other matters, he should not be given them at this time.
>
> THE COURT: The objection is sustained only that which deals with the identification." (TR-A249).

Harry Bogin testified, on direct examination, that on March 11, 1971, he arose about 6:30 A.M. at his home at 2785 Brighton 8th Street, Brooklyn, New York, left his house about 7:00 A.M. and walked across the street where he noticed his company's truck had a flat tire. He walked to the rear of the truck, stepped onto the sidewalk and saw a man emerge from a car parked in front of the truck with "what looked to me like a machine gun." H

got a full view of the man for "no more than a second" before turning and starting to run. He recognized the man as the same person he had seen on another occasion at the Federal Courthouse in New Jersey. He heard firing and the next thing he knew he was lying on the ground across the street. The next day the prosecutor (Mr. Davenport) entered his hospital room at Coney Island Hospital and told him that he, (the prosecutor), was "bringing in someone that he would like me to look at," that two people then entered the hospital room with the appellant, whom Bogin identified as the man who shot him. Bogin was also shown photographs of many people but could not recall whether the photos were shown to him before or after appellant was brought into the hospital room. He recognized four or five of the people depicted in the photographs and one of them was the appellant. After the shooting he said he had told his wife that "I was shot by Tremarco." (TR-A37-A51).

On cross-examination, Bogin testified that he had no recollection of the weather conditions on March 11, 1971 but that to the best of his knowledge, because he was "not fully wide awake", it was not raining and there was no smoke, fog or haze. (TR-A58-A59).[3] Bogin stated that when he first saw the man coming out of the car he did not recognize him as the appellant; that as the man started to turn towards him he noticed the weapon in his hand and saw the man's face for under a second; that within that second he recognized the weapon as a Thompson submachine gun, saw the man's face and ran. (TR-A58-A62; TR-A108).

3/ A meteorologist testified at the trial that at that particular time, it was raining and the sky was completely overcast with fog and haze. (TR-A479-A487).

Bogin testified he first saw the appellant in the latter part of 1969 or the early part of 1970 in a Courtroom in New Jersey. At that time he was "almost positive" he saw appellant full face when appellant turned around in the Courtroom for "probably about a couple of seconds maybe less". Thereafter, Bogin went to a room to be fingerprinted where he remained for approximately twenty-five minutes. Appellant was with him during this time, but Bogin had his own problems and was not looking at appellant during the entire period. He also admitted that he was shown photographs "possibly two or three times" in the hospital and that he picked out a photo of appellant and also picked out another person's photo that he later characterized as having a likeness to appellant. When appellant entered his hospital room with two other men, appellant had handcuffs on and Bogin expected the man who shot him to be brought in at that time. While in the hospital, Bogin was conscious but "not fully aware of who I was speaking to." He did not know how long he was awake in the hospital prior to appellant being brought in. Tremarco's name had been mentioned by persons in the hospital room prior to appellant being brought in handcuffed. (TR-A66-A67; TR-A71-A72; TR-A74; TR-A88; TR-A90-A99; TR-A101-A102; TR-A114). Before the trial jury, Bogin testified on direct examination essentially as he had previously at the suppression hearing. (TR-A395-TR-A397). On cross-examination, Bogin testified "...it was fairly light out" not raining, no fog or haze. He stated "this was just after I got up in the morning I'm not fully awake,...", but he was functioning and a little sleepy, and that the morning was clear. That he saw his assailant full face for under a

second. He did not recall if his assailant had a hat on, how the assailant was dressed, or whether the man had an overcoat, a jacket or a sweater on. (TR-A408-A412; TR-A422-A423; TR-A425).

Gerald Collins, a Special Agent of the F.B.I. testified that on March 12, 1971, at approximately 8:00 A.M. he, together with several other F.B.I. Agents, went to the Police Department, Newark, New Jersey, to pick up the appellant for arraignment on a warrant issued in the Eastern District of New York on charges of obstruction of justice arising out of the shooting of Harry Bogin.[4] After arraigning appellant in Federal Court in Brooklyn, New York, Agent Collins went to the Coney Island Hospital where he saw Bogin and displayed to Bogin forty-eight photographs, one of which was a picture of appellant, and that Bogin had stated that "that is him". (TR-A134-137; TR-A146). On cross-examination, Agent Collins stated that he made a report concerning the events he had just testified to on direct examination but he refused to disclose that report to either the Court or counsel, claiming that the report contained information pertinent to other matters. An exception was taken to the Court's refusal to order the production of the report (TR-A137-A139).[5] Agent Collins testified that the photographs were displayed to Bogin prior to appellant being brought into the room approximately one hour thereafter. (TR-A137-A148).

Agent Collins denied having obtained the federal warrant to assist the State of New York in getting Tremarco from New Jersey

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4/ Appellant was never indicted by federal authorities on these charges. (TR-A140)

5/ The F.B.I. refused to turn over the reports. (TR-A104; TR-A302).

to New York, but he admitted that he never experienced a situation where a man is arrested in one State and brought to another State to be arraigned. He also stated that when appellant was released without bail, he was immediately taken into custody by New York City Police detectives. (TR-A153-A159).

Prior to the suppression hearing, defense counsel had served a subpoena duces tecum on the Federal Bureau of Investigation and upon the United States Attorney's Office in the Eastern District of New York for the reports of investigations made by federal agents concerning any statements taken from Harry Bogin. (TR-A14; TR-A24-A29) A motion was made to quash the defense subponea by Assistant United States Attorney Rosenthal on the grounds that the material sought came within the aspect of privileged government documents. (TR-A27-A29)

Harry Bogin had testified at the pre-trial hearing (TR-A53):

> Q. Did you have any conversations with any agents of the Federal Bureau of Investigation relating to his case, Mr. Bogin?
>
> A. Yes, I did.
>
> Q. And did they take notes?
>
> A. To my knowledge, they probably did.

Then the following colloquy took place, (TR-A53):

> MR. GILLEN: I call upon the District attorney to use his good offices with the Federal Government to produce any statements and any recordings made of statements by any federal agent of Mr. Bogin.
>
> MR. DAVENPORT: I can step outside and ask Agent Collins, who is standing outside, if he has any memorandum.
>
> THE COURT: Very well.
>
> MR. GILLEN: Not only if he has it, if there are any in the F.B.I. files.
>
> MR. DAVENPORT: I can ask Collins."

Agent Collins testified, (TR-A137-A139):

"Q. Mr. Collins, have you made any reports in reference to your testimony that you gave here today?

A. Yes, sir.

Q. Are those reports called 302-H reports?

A. 302 are contained in reports, however, the testimony I have given you are contained in some F.B.I. reports.

MR. GILLEN: I respectfully demand this report.

THE COURT: Is it related to this incident?

MR. GILLEN: Yes, sir.

THE COURT: Do you have them?

THE WITNESS: No, sir I do not have them.

THE COURT: Are they available?

THE WITNESS: No, sir, they are not. These reports encompass several other federal violations, very serious, in which the defendant is also under investigation for, and it is for this reason, to my knowledge--

THE COURT: Can the information being sought in this proceeding be divulged without taking off the other matter?

THE WITNESS: I say no, sir, that there is information contained on these 302s which are pertinent to other matters and which we could not give them, however, I would be glad to testify as to the specific offenses that is here.

THE COURT: All right.

MR. GILLEN: I respectfully except, Your Honor.

THE COURT: Well if it could be readily accessible and split up without divulging the other information, I would order him to produce it. If he tells me it is part and parcel of other investigations, I will not do so.

MR. GILLEN: I respectfully except. I suggest it curtails my cross-examination. I respectfully object to it under the 14th Amendment of the Constitution of due process."

Special Agent Collins further testified (TR-A171-A172):

> "Q. And did Mr. Bogin tell you that he told Mr. Sternberg that Mr Tremarco had shot him?
>
> A. Right.
>
> Q. Is that in your report?
>
> A. To my recollection it is.
>
> MR. GILLEN: I ask for that report, Your Honor.
>
> THE COURT: Is that a separate report?
>
> THE WITNESS: No, sir. Your Honor the report encompasses, as I stated before several federal violations in which Mr. Tremarco is currently under investigation by our office.
>
> THE COURT: And have you been ordered not to produce them?
>
> THE WITNESS: Yes, because it is one complete report involving several federal violations, including obstruction of justice.
>
> THE COURT: And you wouldn't produce that to any authority, including the Judge; is that correct?
>
> THE WITNESS: That's correct. That's my instructions."

The trial Court in quashing the subpoena for the federal records, as noted, had previously unequivocably stated, (TR-A139) with respect to the report or reports:

> "Well, if it could be readily accessible and split up without divulging the other information, I would order him to produce it. If he tells me it is part and parcel of other investigations, I will not do so." [Emphasis supplied]

The trial court gave credence to attorney Brown's testimony and ruled that Bogin's identification of appellant at the hospital and Bogin's identification of a photograph of appellant at the hospital were tainted and inadmissable at the trial. (TR-A326-A330). Nevertheless, the trial Court ruled that it would permit Bogin to give an in-court identification. (TR-A330).

The Trial

The sanitized "in-court identification" convicted appellant. The trial itself consisted of but brief medical testimony (TR-A373-A382), the testimony of Harry Bogin with, essentially, his identification of appellant restricted to his statements as to observations made at the scene of the shooting and the prior observation at the Federal Court in Newark, New Jersey. (TR-A 395-A428) The defense offered, in essence, alibi testimony. The defendant did not take the stand.

Appellant, having exhausted his state remedies then turned to the Federal Courts. In so doing, appellant filed a petition for a Writ of Habeas Corpus setting forth the details of his arrest and conviction as well as grounds for relief. (A.4a-A.24a).

In its memorandum and order, dated May 24, 1973, the District Court ordered the federal custodian of statements made by Bogin to federal authorities, to turn them over to appellant. (A.27a A.39a). Pursuant to letter, dated June 1, 1973, the United States Attorney turned over photocopies of a portion of the F.B.I.'s reports on the incident. (A.40a A.46a). Appellant's counsel then drew certain matters to the District Court's attention, by letter dated September 26, 1973, requesting, among other things, a full hearing to bring out all the facts. (A.47a A.54a).

Appellant, on August 20, 1974, based on the information received, moved for either a new trial or a full hearing on these issues. (A.55a A.66a). In compliance with the United States District Court, appellant again returned to the State Courts, seeking a new trial based on the pre-trial material turned over to appellant, but to no avail. (A.67a A.70a). Subsequently,

the case was transferred to the United States District Judge Walter Bruchhausen who, pursuant to a memorandum and order, dated June 18, 1975, without hearing oral argument, denied appellant's motions and dismissed appellant's petition for a Writ of Habeas Corpus. (A.71a A.75a). Appellant thereafter filed a notice of appeal. (A.76a)

QUESTION PRESENTED

May appellant, under the circumstances demonstarted in this case, be constitutionally denied either a writ of habeas corpus mandating a new trial or requiring, for the purpose of determining whether such a writ must issue forth, a full hearing into federal authorities' knowledge and records of the events leading up to his arrest and of their participation in events preceding as well as during trial, inclusive of the federal authorities knowledge and records as to the sole eyewitness whose testimony, alone, convicted appellant of the attempted murder of the same eyewitness?

POINT I

UNLESS A WRIT OF HABEAS CORPUS REQUIRING A NEW TRIAL IS NOW GRANTED, A FULL HEARING OF ALL THE FACTS AND CIRCUMSTANCES OF THIS CASE IS MANDATED IN THE INTERESTS OF SUBSTANTIAL JUSTICE

The facts, ascertained to date, and set forth at pp. 4-16 in appellant's brief, show that;

(1) appellant, upon his surrender to Newark, New Jersey, state authorities, was held incommunicado while his counsel waited outside;

(2) federal authorities were present when this was going on;

(3) although a federal magistrate was then available, in Newark, literally but across the street, and counsel for appellant was present, federal authorities ignored the mandatory provisions of Rule 5, Federal Rules of Criminal Procedure, and instead of taking appellant without unnecessary delay before the nearest available United States Commissioner,[6] spirited him off, past the then Commissioner in Newark, New Jersey, to the then Commissioner in Brooklyn;

(4) upon arrival at Brooklyn, the federal authorities suddenly lost interest in appellant, albeit he was charged with a most serious federal offense, "released" him on his own recognizance to New York State authorities who were, inexplicably, just waiting there;

(5) the state authorities then, after agreeing with appellant's counsel just to book appellant and not to subject appellant to lineups or other incriminating acts, whisked appellant off to a

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6/ Rule 5, F.R.Cr.P., prior to the 1972 amendment, so provided.

hospital, where both federal and state authorities were present, and subjected appellant to a subsequently judicially determined prejudicially illegal confrontation with his alleged victim and sole eyewitness accuser, complicated by a judicially determined prejudicially illegal photographic line-up/display;

(6) at a pre-trial hearing federal authorities successfully moved to quash subpoenas calling for the production of federal records as to events surrounding the arrest of appellant, inclusive of interviews of the sole eyewitness/accuser/victim and other related material;

(7) the sole eyewitness/accuser/victim testified at the hearing that he had been interviewed by federal authorities;

(8) the federal agents (Collins and Steadman) testified at the state hearing that they would not produce the federal reports, or any part of them, because information contained therein pertained to other investigative matters;

(9) the state court would have required the production of the reports if it could be "...readily accessible and split up without divulging the other information..." but did not do so since the court was told it was all intricately part and parcel of other investigations;

(10) the assistant United States attorney in charge of the case asserted in the state court that there was no magistrate available in New Jersey, that bail was not requested in this serious case because the federal jails were crowded, and also asserted that it wasn't known how the New York City Police knew of appellant's presence in Brooklyn;

(11) the state police and prosecution produced but one

ballistics report and declined to produce all the ballistic reports;

(12) when, pursuant to the petition for habeas corpus, the United States District Court initially required just the production of federal interviews of the sole eyewitness/accuser/victim, those produced (A.40a-A.46a) were:

(a) quite capable of being read without reference to any other investigation and pertained solely to the event for which appellant was tried (A.41a-A.46a);

(b) contained a reference to federal inquiry as to whether the eyewitness had a gun at the time the incident occurred (A.41a);

(c) failed to mention several key assertions of the eyewitness, i.e., that he had told his wife and a neighbor that it was the appellant who had shot him, etc. although the agent who prepared the report had testified that such was in his report. (A.41a-A.46a).

(d) contained a report by an agent (Sandidge) not mentioned or produced at the hearing, who interviewed the eyewitness on the very day of the shooting, whose report mentions the presence of two other men and that the witness "...further advised that he did not have a gun." (A.41a)

Analysis of the facts disclose constitutionally disquieting but heretofore successful federal/state steamroller tactics that have suppressed evidentiary material which should have been made available to the appellant and his counsel at his trial. It also shows strong indicia of intertwined federal/state prosecutorial misconduct in the form of deliberate misrepresentations to court and counsel of a nature that lends credence to the conclusion

that from the tip of this factual iceberg there emanates an odor inconsistent with the honest fragrance of a revelation of all the facts, and the documented suspicion that if these facts became known, a different ending to this legal drama might well have unfolded.

The United States District Court, in attempting to deal with the problem as presented, initially ordered the production of statements made by the sole eyewitness/victim. (A.38a-A.39a) The statements produced to date, as noted above, revealed no basis for the assertions, made in the state court by federal agents, that the contents of all the statements were hopelessly intertwined with information concerning other matters under investigation. Thus, this portion of the evidentiary iceberg has been shown to be bottomed by a deliberate suppression of evidence by federal authorities and, under the circumstances of this case, the suppression may well have been knowledgeably acceded in by state authorities. The refusal by the state authorities to turn over all the ballistic reports, viewed in the light of the unearthed statement made by the sole eyewitness to federal authorities at the hospital on the day of the shooting, to the effect that he didn't have a gun that day, as made to a federal agent not produced at the hearing, in a statement reluctantly revealed only pursuant to the District Court's order, looms even more ominously as further evidence of other suppression of vital evidence. In either case the suppression is emphatically deliberate.

In United States v. Hilton, _____F.2d_____(2d Cir. 8 Aug. 1975), this Circuit stated, with respect to governmentally withheld evidence:

> "The legal standard to be applied in determining whether a new trial should be granted when the government fails to produce Jencks Act material, 18 U.S.C. §3500, depends on whether the suppression was deliberate or inadvertent. If the government deliberately suppresses evidence or ignores evidence of such high value that it could not have escaped its attention, a new trial is warranted if the evidence is merely material or favorable to the defense. But if the government's failure to disclose is inadvertent, a new trial is required only if there is a significant chance that this added item, developed by skilled counsel, could have induced a reasonable doubt in the minds of enough jurors to avoid a conviction.[2]
>
> Obviously diverse policy considerations are at work here. On the one hand, fairness to the defendant dictates a new trial where there has been even inadvertent failure to disclose evidence which in the hands of skilled counsel might have induced a reasonable doubt. On the other hand, it is the policy of the court that it, and not the United States Attorney's office, will rule on the materiality of evidence which may be only marginally useful to the defense."

As in the instant case, in Hilton, ibid, the evidence deliberately suppressed dealt with potential areas of cross-examination of a sole and key witness involving credibility and motivation to fabricate.

A novel factor is involved in the instant case. A state trial and conviction, nevertheless, it encompassed a blend of federal as well as state investigation and federal cooperation in obtaining a state conviction. And it is appellant's position that unlawful deliberate suppression and prosecutorial misconduct emanated from both federal and state authorities to the extent that he was effectively denied a fair trial. Furthermore, it is appellant's view that if both federal and state authorities combined to deny him a fair trial that it is not unreasonable to believe that, if counsel is given the opportunity of a full hearing, he can develop proof that the entire "identification"

was a miscarriage of justice.

A companion case to Jencks v. United States, 353 U.S. 657 (1957), the forerunner decision that produced §3500, Title 18, U.S.C., in the sense of its being the New York State counterpart, is People v. Rosario, 9 N.Y.2d 286, 213 N.Y.S.2d 448 (1961). But the limitations of §3500 vis-a-vis the time of production of the statements of a witness is broader in the state courts. Thus, in People v. Malinsky, 15 N.Y.2d 86, 262 N.Y.S.2d 65, (1965) the New York Court of Appeals applied the rule of disclosure to either a hearing or the trial. People v. Malinsky, id at 90, N.Y.S.2d at 70.

At page 7 of its memorandum opinion, dated May 24, 1973, which granted preliminary relief, to the extent that the United States Attorney, while required to produce statements, at the same time was permitted to determine what to turn over,[7] the District Court pointed out that "the government has an obligation to insure that justice is done, and that it is unconscionable to allow the government...to deprive that individual of anything which might be material to his defense." (A.33a). The District Court also went on to state (A.34a-A.36a):

> "Utilizing the same rationale the Supreme Court in the case of Brady v. Maryland, 373 U.S.83 (1963), held that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. Id. at 87.

7/ But see, United States v. Hilton, _____F.2d_____(2d Cir. Aug. 8, 1973), which specifically stated that:
"...it is the policy of the court that it, and not the United States Attorney's office, will rule on the materiality of evidence which may be only marginally useful to the defense."

"Clearly the purview of Brady and Jencks would encompass evidence which would serve to impeach in any way the positive identification of the petitioner by Harry Bogin. Moore v. Illinois, 408 U.S. 786 (1972).

"Analysis of both federal and New York law discloses that a defendant in a criminal case has a right to examine the statements of witnesses who testify against him. A violation of that right should properly give rise to a presumption, in the absence of clear proof to the contrary, that the defendant was prejudiced and should be viewed as a violation of due process. Killian v. United States, 368 U.S.231 (1961); Rosenberg v. United States, 360 U.S.367 (1959); United States v. Missler, 414 F.2d 1293 (4th Cir. 1969).

"In his brief the Attorney General of the State of New York argues that the state prosecutor had no duty of disclosure with regard to the statements of either Bogin or Special Agent Collins. It is claimed that since the F.B.I. refused to make those statements available, the New York prosecutor, having no jurisdiction over the matter, was exonerated from any duty of disclosure. Indeed the record reflects that the Federal Government refused to turn over the requested statements to the defense.

"A question arises, then, as to the propriety of the Federal Government's refusal to make the statements available. For, notwithstanding that the state prosecutor did not have custody of the statements, if it is found that their denial was improper, and that the statements were material to the defense, the court would be compelled to conclude that the petitioner had not been given a fair trial and that his right to due process had been violated. Moore v. Illinois, supra.

"Undoubtedly if the state prosecutor had custody of the statements or if Tremarco had been tried in a federal court, the statements would have been turned over to the defense. That the statements included matters which were unrelated to the testimony of the witnesses would not have prevented the defense counsel from obtaining those statements which were related to the testimony given. In such a situation the courts have the power to order that the extraneous matters be redacted or that the statements be submitted for an in camera inspection whereby the judge would determine what matters should be made available to the defendant.

"In his brief the United States Attorney for the Eastern District of New York argues that the United States Government has the right to deny access to the statements in question pursuant to the authority granted to the United States Attorney General by the Freedom of Information Act, 5 U.S.C. §552(b)(1971)..."

"The record of this case discloses that at all times throughout the proceedings the defense counsel's request for statements has been limited to only those which relate to the testimony of the witnesses appearing against his client. Accordingly when Agent Collins was allowed to testify about his conversations with Bogin the Federal Government waived any privilege it may have had with regard to the information divulged. Consequently, the government's refusal to make the statements available was improper.

"Having determined that the statements were illegally denied the court is still faced with the question of their materiality. Unfortunately, the Federal Government continues in its steadfast refusal to make the statements available. In view of the court's finding that the United States has waived its privilege of secrecy with regard to the requested statements, the court orders the United States Attorney for the Eastern District of New York, the present custodian of the statements, to turn them over to petitioner's counsel, Michael J. Gillen, Esq. The court will reserve final decision on this proceeding pending examination of those statements and the completion of any other proceedings which may be required. Should a problem arise as to the extraction of extraneous material from the reports the United States Attorney should proffer the reports to the court for an in camera inspection."

Appellant, armed only with the statements he had finally pried loose from the federal government, marched back to the state court where his request for a new trial was again denied. He returned to the United States District Court, renewing his petition for a Writ of Habeas Corpus, seeking a full hearing and, ultimately, a new trial. (A.55a-A.70a) A transfer of the case took place and Senior United States District Judge Walter Bruchhausen, without oral argument denied the petition pursuant to memorandum and order, dated June 18, 1975. (A.71a-A.75a)

In denying appellant's petition without a hearing, the district court cited as its authority United States ex rel. Rice v. Vincent, 491 F.2d 1326 (2d Cir. 1971) and United States v. Ruggiero, 472 F2d 599 (2d Cir. 1973). However, the factual patterns of Vincent, ibid, and Ruggiero, ibid, are such as to make their application to the instant case, and the legal rulings based thereon, inopposite. In Vincent, a state robbery-

murder case, the defendant had made a full confession and the physical facts were corroborated by independent witnesses. In Ruggiero, a state perjury case, the defendant admitted his dealings with the principals involved but denied the existence of certain illegal aspects of the conversation. Furthermore, the material sought was not suppressed and dealt with witnesses who were available to question and testify. In the instant case, the appellant never took the stand and the state's case was based entirely on the uncorroborated eyewitness testimony of the victim.

In United States v. Banks, 383 F.Supp. 389 (W.D.S.D. 1974) the court, in dismissing an indictment, found it unnecessary to reach the constitutional question of whether the prosecution's conduct had prejudiced the trial to the point that due process was offended. But, instead, exercised its supervisory powers, and ordered a dismissal because the government's misconduct was so aggravated that a dismissal had to be entered in the interests of justice. The court acted because there was evidence that the administration of justice had become tainted. Events had shown that the prosecution had used false testimony, deception of the court, etc., in short a pattern of misconduct. Id at 393-397.

The conclusions of the Court in Banks, id at 397, have application, in principle, to the instant case, and warrant quotation:

> "This court is mindful of the heavy responsibility that it bears in our criminal justice system. It is unquestionably essential to our society that our laws be enforced swiftly and surely. This court also believes, however, that our society is not bettered by law enforcement that, although it may be swift and sure, is not conducted in a spirit of fairness or good faith. Those who break our laws must be brought to account for their wrongs, but it is imperative

that they be brought to this accounting through an orderly procedure conducted in the spirit of justice. This court's first duty, then, is to insure that our laws are fairly enforced, or as Mr. Chief Justice Warren aptly put it: "[our duty] is to see that the waters of justice are not polluted." Mesarosh v. United States, supra, 352 U.S. at 14, 77 S.Ct. at 8.

Although it hurts me deeply, I am forced to the conclusion that the prosecution in this trial had something other than attaining justice foremost in its mind. In deciding this motion I have taken into consideration the prosecution's conduct throughout the entire trial. The fact that incidents of misconduct formed a pattern throughout the course of the trial leads me to the belief that this case was not prosecuted in good faith or in the spirit of justice. The waters of justice have been polluted, and dismissal, I believe, is the appropriate cure for the pollution in this case."

What the appellant seeks here is but an opportunity to bring to light all the facts preceding his trial bearing upon the sole eyewitness, his credibility, his motivation, and to ascertain whether or not he was denied due process of law and the effective assistance of counsel, in particular by wilful suppression of evidence, by prosecutorial misconduct, whereby he was denied a fair trial conducted in the spirit of justice. As to the latter, it is submitted that even as the record stands now, it is evident that it was not.

Where material suitable for cross-examination of a key witness is even erroneously withheld by the prosecutorial forces and its non-existence is utilized for the purposes of making the court rule favorably to the prosecution, the prosecution is charged with the knowledge of his associates. United States v. Ott, 489 F.2d 872 (7th Cir. 1973). There the 7th Circuit stated, id at 873-874:

"We assume that the denial by the trial attorney was made in good faith in the sense that he did not know that his representation was factually erroneous. Nevertheless, when an unequivocal material representation of this kind is made to the trial judge for the purpose of persuading him to make a ruling favorable to the government, the prosecutor is charged with the knowledge of his associates. Whether the misstatement 'was a result of negligence or design, it is the responsibility of the prosecutor. The prosecutor's

> office is an entity and as such it is the spokesman for the Government.' Giglio v. United States, 405 U.S. 150, 154, 92 S.Ct. 763, 766, 33 L.Ed.2d 104."

In the instant case, significant misrepresentations were made to the state court by government agents which resulted in a ruling favorable to the interests of both the federal and state government; and apparently an Assistant United States Attorney misrepresented, by "cover-up", to the state court. And the decision to withhold federal investigative reports pertaining to, and interviews of, the state's key witness was made by personnel of the office of the United States Attorney. The degree of cover-up and whether it was done with the conscious knowledge of the state prosecution remains an open question capable of resolution at a full hearing. The analogy, of course, is that the state prosecution, working hand in glove with federal authorities cannot deny knowledge of the actions of his federal cohorts and the latter cannot disassociate their acts from the events that took place in the state prosecution. The court in Ott, id at 874, noted the admonition in Berger v. United States, 295 U.S. 78, 55 S.Ct. 629, 633 (1935) stating:

> "Though the prosecutors are no doubt familiar with Mr. Justice Sutherland's classic statement of the obligation of the attorney for the sovereign in Berger v. United States,[3] on occasions zeal for victory nevertheless supersedes the overriding obligation to govern impartially.[4] to make it plain that the language of Berger conveys a message which must be heeded, not just admired, reversal is sometimes required.[5]
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> * * *
>
> "5. We are acutely aware of the cost to society of ordering reversal. The difficulty a court faces in having to apply Berger is illustrated by Judge Learned Hand's comment in United States v. Lotsch: "Unhappily, it would accomplish little towards punishing the offender, and would upset the conviction of a plainly guilty man. No doubt such an impropriety may be grave enough to demand this extreme course:

> the Supreme Court found us too complaisant, for example, in Berger v. United States, 295 U.S. 78, 55 S.Ct. 629, 79 L.Ed. 1314. It is hard to know where to draw the line; but the offense was far less flagrant here than in Berger's case, and it seems to us that a reversal would be an immoderate penalty." 102 F.2d 35, 37 (2d Cir. 1939). In this case we conclude that reversal is not an immoderate, but rather is the required, penalty."

The defense by prosecutors that the left hand didn't know what the right hand was doing has been found to be wanting in merit. And inconsistency between the actions of different prosecutors, albeit inadvertent, doesn't lessen its impact. Santobello v. New York, 404 U.S. 257, 92 S.Ct. 495, 499 (1971). Government cannot avoid the consequences of its depredations by the simple device of switching forums and each, Tweedledum to Tweedledee, excusing the other's acts by contending lack of control over the ultimate result. Thus, in a federal habeas corpus review of a state conviction, the effect of non-disclosure is not neutralized because the state prosecuting attorney was not shown to have had knowledge. Failure of the police to reveal material evidence in their possession is equally harmful whether purposeful or negligent. If the state's prosecutor is the victim of police suppression of material information, the state's failure on that account is not excused. Undisclosed and unproduced documents, material to the case, in police hands, must be produced. Barbee v. Warden, 331 F.2d 842, 846 (4th Cir. 1964). The question is whether the procedure as a whole comported with the requirements of due process. The state is accountable for all information which comes within the knowledge of its agents. The knowledge of the police is chargeable to the prosecutor. Barbee v. Warden, ibid; Evans v. Kropp, 254 F.Supp. 218, 221-222 (E.D. Mich. 1966).

Where the available evidence establishes suppression of

evidence (here clearly intentional) but not the total extent, and where there are rational reasons to surmise that further inquiry is warranted, a limited remand procedure should be adopted with directions to the district court to amplify the record and make appropriate findings of fact and conclusions of law as to whether a conviction should be permitted to stand. See, United States v. DeVoe, 489 F.2d 158, 160 (5th Cir. 1974). And where a conviction depended solely on the testimony of a single witness, ipso facto, the credibility of that witness was an important issue, a full hearing and examination of the government's files, to see whether any evidence developed therein would in any reasonable likelihood have affected the judgment of a jury, is warranted. See, United States v. Brawer, 482 F.2d 117, 136 (2d Cir. 1973).

To permit what has transpired in the instant case would be giving license to a lawless practice whereby federal authorities could arrest using a federal warrant solely on behalf of a state charge, transport a suspect without state extradition proceedings, or even the protection afforded by Rule 40, Federal Rules of Criminal Procedure; investigate without fear of disclosure as to any evidentiary shortcomings in proof, credibility or motivation of key witnesses, then transfer physical prosecution to state authorities, disavow participation and prohibit disclosure of material evidence simply by citing privilege in the state court. The state, in turn, would reap the benefit of "sanitized" evidence sans court scrutiny and devoid of a skilled defense counsel's complete examination, would be able to plead non-responsibility for the recalcitrance of its associates in government and be placed in the unique position of being able to conspire to obstruct justice and due process of law while urging law enforcement on its own singular terms.

To permit argument that what has been unearthed to date, in hindsight, would not have changed the ultimate verdict and that we should dig no further, would be to ignore the overall circumstances of its unearthing, the deliberateness of its denial and the very real prospect that the smoke produced to date is an attempt to obscure the real fire. As this Circuit stated in United States v. Hilton, ibid:

> "If the government deliberately suppresses evidence or ignores evidence of such high value that it could not have escaped its attention, a new trial is warranted if the evidence is merely material or favorable to the defense." [Emphasis supplied]

In United States v. Morell et ano, F.2d (2d Cir. August 29, 1975), the Circuit recently stated:

> "Furthermore, our cases establish that in cases of deliberate suppression, "prophylactic considerations", designed to deter future prosecutorial misconduct are of overriding importance. Grant v. Alldredge, supra, 498 F.2d at 381; United States v. Pfingst, 490 F.2d 262, 277 (2d Cir. 1973), cert. denied, 417 U.S. 919 (1974); United States v. Keogh, supra, 391 F.2d at 147-48. Accordingly, if the failure of the government to produce the confidential files was deliberate or the result of gross negligence, the appellants would be entitled to a new trial."

It is submitted that the evidence deliberately suppressed by the federal government in this case meets the "prophylactic considerations" test even as of now and warrants the granting of the writ or, at the very least, a full hearing with findings of fact and law, to fairly, adequately and clearly resolve the issues presented.

CONCLUSION

Appellant's petition for a writ of habeas corpus, dismissed below, should be reinstated and granted, either as to the ordering

of a new trial or a full evidentiary hearing with determinations of fact and law to be submitted for review and resolution in the Circuit Court.

Respectfully submitted,

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STATE OF NEW YORK
CITY OF NEW YORK
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Lloyd Christie being duly sworn, deposes and says, that he is over 18 years of age. That on the 3rd day of October 1975, he served the attached Brief for the Appellant as follows:

To: Attorneys for Respondents-Appellees: Amounts

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the attorneys for the Respondents Appellees herein by depositing the same, properly enclosed on a securley sealed post-paid wrapper, in a U.S. Post Office at 90 Church Street, New York City, directed to said attorneys at the afore mentioned addreses, that being the place where they maintain their offices for the regular transaction of business, and the last address mentioned in the papers last served by them

.....

Sworn to before me this
3 day of October 1975

EUGENE KANE
Notary Public, State of New York
No. 24-4206[illegible]
Qualified in [illegible] County
Commission Expires March 30, 1977